

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8390 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

PATEL BAHECHARBHAI JETHABHAI

Versus

DISTRICT MAGISTRATE

Appearance:

MR BN PATEL for Petitioner

Mr.A.B.Vyas, A.G.P. for Respondent No. 1, 2 & 4

MR BHARAT T RAO for Respondent No. 3

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 05/03/99

ORAL JUDGEMENT

1. The petitioner, through this writ petition under Article 226 of the Constitution of India has challenged the detention order dated 15.9.1998 passed by the District Magistrate, Sabar Kantha at Himatnagar under Section 3(2) of the Prevention of Black Marketing of Essential Commodities and Maintenance of Supplies Act and has prayed that the aforesaid order be quashed and he may be released from illegal detention forthwith.

2. Peculier facts in brief giving rise to this petition are as under :

The petitioner is partner in hotel business run in the name of Shine Art High-way Road, Khedbrahmma. Basically he is carrying on hotel business in partnership. For preparing food and other articles the petitioner is using kerosene oil in stoves. It is not the case of the detaining Authority that the petitioner is either licence holder or dealer in kerosene. The hotel premises was inspected by supply staff on 17.6.1998. It was found that three barrels were lying in the premises of the hotel, of course behind the hotel premises in the compound. One barrel was found empty and in remaining two barrels it was alleged to be blue kerosene. A hand pump was found fitted in one of the barrels for taking out kerosene. The total quantity of kerosene contained in two barrels was estimated to be 450 ltrs. The three barrels and hand pump were seized and taken in possession by the Inspecting staff and were handed over to a fair price shop dealer S.S.Gandhi. It is informed that sample was taken from the barrels four days after inspection and the sample was sent to Forensic Science Laboratory for examination and report. Statement of the petitioner was also recorded by the Inspecting Staff. The detaining Authority found that blue kerosene was kept in two barrels which obstructed supply and maintenance of essential commodity, viz. blue kerosene. Accordingly the impugned detention order was passed. Efficacious alternative remedy was also considered by the detaining Authority and in his opinion the prosecution under the provisions of the Essential Commodities Act was not effective because the detaining Authority was affraid that in case prosecution is launched the petitioner may obtain bail and continue in such activities.

3. This order has been challenged on five grounds. Some of the grounds are involving disputed questions of fact which cannot be decided in a writ petition under Article 226 of the Constitution of India.

4. One of the grounds of attack has been that it is a peculiar case where the petitioner, who is neither licence holder nor dealer in kerosene has been detained under the provision of the Black Marketing Act. The learned Counsel for the petitioner contended that the petitioner is running a small hotel on high-way and the hotel is situated in village area. For preparing food articles on a small scale the petitioner is using kerosene in stoves for preparing meals and other food articles, and that he has not obstructed maintenance and supply of kerosene. It was also argued that adequate safe-guards and pre-cautions were not taken to seal the commodity at the time of seizure and that the commodity

was handed over to one Mr.S.S.Gandhi, a fair price shop dealer to be preserved. He also contended that surprisingly enough sample of kerosene was not collected at the time of inspection and no pre-caution was taken to seal the containers, viz. Barrels at the time of inspection and the petitioner was unaware from where the sample was collected and sent for examination by Forensic Science Laboratory. His other contention has been that the report dated 28.9.1998 sent to the Central Government was considered after considerable delay on 13.11.1998 and this has violated fundamental right of the petitioner as contained under Article 22(5) of the Constitution of India. Further contention has been that non-supply of material documents has affected the petitioner's right of making effective representation. It was also argued that it is a peculiar case where the State Government has rejected the representation of the petitioner which was forwarded by the Central Government to the State Government only for obtaining parawise comments.

5. All these contentions have been considered.

6. Learned A.G.P. on the basis of explanation to Section 3(1) of the Prevention of Black Marketing Act contended that since the petitioner committed breach of notification issued by the State Authority not to keep kerosene beyond 18.5 ltrs. statutory violation of the notification was enough to put the petitioner in detention under prevention of Black Marketing Act. It is really difficult to accept this contention. Every violation of control order or notification issued under the provisions of the Essential Commodities Act may technically give rise to a cause of action to the Detaining Authority to detain such person violating such notification under the prevention of Black Marketing Act, but once it is proposed to curtail personal liberty of a citizen it should be kept in mind that the detention should be in the nature of preventive detention and not punitive detention. Mere keeping of 400 and odd ltrs. of kerosene was not such a serious offence for which the petitioner should have been detained under the Black Marketing Act. There was explanation of the petitioner that he purchased kerosene from hawkers selling the same on lorries at a time not exceeding 15 ltrs. He purchased the kerosene for stoves for the purpose of preparing food and other articles in the hotel. This explanation of the petitioner was not given serious consideration by the detaining Authority. Breach of notification certainly gave cause of action for instituting criminal prosecution but that option was not exercised; rather the detaining Authority had chosen to detain the petitioner

preventively. On the facts and circumstances of the case the detention of the petitioner seems to be punitive in nature and not preventive. After all if he would have been prosecuted under the Essential Commodities Act he would have been afforded adequate opportunity of explaining in what manner, on which date and in what quantity he purchased kerosene from various hawkers. That opportunity was deprived on the mere apprehension of the detaining Authority that in case of prosecution the petitioner may be enlarged on bail. This apprehension is not enough for detaining a person under the Act for committing such insignificant violation of notification. Thus, the impugned order becomes invalid because it is not preventive in nature rather it is punitive in nature.

7. Non-application of mind to the material on record is also exhibited in the grounds of detention. It seems that the detaining Authority wanted to consider the report of the Forensic Science Laboratory whether the commodity was blue kerosene or not, but he failed to consider material breach that the barrels were not sealed at the time of inspection. Unsealed barrels were handed over to one Mr.S.S.Gandhi for custody till further orders. It was rightly contended by the learned Counsel for the petitioner that sample was said to have been taken from the barrels when the same were in custody of Shri S.S.Gandhi and that in between the date of inspection and collection of sample the commodity was not sealed. If this was state of affairs then the detaining Authority should have applied its mind why the sample was not collected immediately at the time of inspection and whether there was any possibility that sample of blue kerosene was collected from elsewhere. The petitioner's case was that it was not blue kerosene. The detaining Authority seems to have relied upon the admission of the petitioner, but since this material defect occurred in the course of search and seizure it can be said that the detaining Authority did not apply its mind to all material and relevant facts and circumstances of the case.

8. The State Government considered the representation of the petitioner in a casual fashion. Only one representation was sent to the State Government. It was rejected and rejection order was communicated to the petitioner. A copy of such representation of the same date was sent to the Central Government. The Central Government forwarded the same to the State Government for parawise comments. Instead of standing parawise comments the State Government took upon itself the task of considering and rejecting the said

representation which also speaks in what manner the officials of the State Government are working in such serious matters. Any amount of arguments by the learned A.G.P. was unable to convince me that the representation received from the Central Government was not decided by the State Government. This argument stands totally repelled from collective Annexure : D, page : 48 of the compilation. The casual manner in which inspection was done, sample was collected and the representation was dealt with by the State Government is a matter of surprise.

9. Leaving aside these contentions only one contention is enough to allow this writ petition. The said contention is that the Central Government has delayed the disposal of representation of the petitioner and no satisfactory explanation of delay has been offered by the Central Government. The contention is not without force. In the counter Affidavit of Shri A.L.Makhijani, Under Secretary in the department of Consumer Affairs, Ministry of Food and Consumer Affairs, New Delhi, in Para : 4 it is admitted that representation dated 28.9.1998 made by the detenu was received in the concerned section on 5.10.1998. The delay caused due to postal transit and transit to the concerned section from one table to another is not to be explained. After considering the representation parawise comments were called telegraphically on the same day. Parawise comments dated 28.9.1998 were received from the State Government in the concerned section on 20.10.1998. There has been no explanation from the State Government why about three weeks time was taken in preparing and sending the parawise comments. The lethargy of the State Government in this matter is also a matter of cause and concern. The Central Government on receipt of parawise comments thought it necessary to seek further clarification on some points from the State Government. The discretion of the Central Government on this point requires no interference. It was well within its jurisdiction to call for additional information after receipt of parawise comments. On 23.10.1998 the State Government was asked to furnish more particulars. The clarification from the State Government was received vide letter dated 29.10.1998 in the concerned section of the Central Government on 30.10.1998. Still the Central Government was sleeping over the representation and decided to take decision on it only on 13.11.1998. Shri B.T.Rao, learned Counsel for the Central Government had no answer to this delay nor this delay between 30.10.1998 to 13.11.1998 has been explained in any manner whatsoever in the counter Affidavit of Shri A.L.Makhijani which has been filed in

this Court only today. Thus, non-explanation of delay in disposal of the representation of the petitioner has certainly deprived the petitioner of his valuable safe-guards contemplated under Article 22(5) of the Constitution of India. This alone is enough for quashing the detention order.

10. Other grounds are also material for quashing the detention order.

11. In the result the writ petition succeeds and is hereby allowed. The impugned detention order dated 15.9.1998 is hereby quashed. The petitioner shall be released forthwith from custody unless wanted in some other case.

Date : March 05, 1999 (D.C.Srivastava, J.)

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